# THE POLICE POWER AND THE POLICE FORCE.

By W. A. Purrington.

With civilization crime increases. This proposition will seem paradoxical only to those who have not defined its terms. The more complex man's social life and the more various his desires and interests, the more numerous are his statutes, enforcement of which is effected through the power of the state. Now, since crime is the doing or failing to do some act the commission or omission of which a public law declares to be punishable, it must, necessarily, increase with the growing complexity of a society that prohibits acts which, under simpler conditions, are permissible. The moral quality of the forbidden act or omission is not, in the legal sense, at least, a necessary element of its criminality, except in so far as it may be deemed immoral to violate any statute, however ridiculous or unjust.

Thus, in New York, from 1887 to 1892, it was a misdemeanor, —that is to say, a minor crime, punishable by fine, imprisonment, or both,—"to intentionally give food or shelter" to an English sparrow *(passer domesticus)*. It is still a misdemeanor in that State to engage in the business of a barber on Sunday; except in the city of New York and the village of Saratoga Springs, where "barbering," as it is called, may be lawfully engaged in on that day up to one o'clock in the afternoon. A bizarre result of this latter statute, prior to the consolidation of Brooklyn with New York in the greater city, was that at the same moment an act was criminal at one end of the bridge connecting the cities which was lawful at the other; and the highest court of the State declared this curious "Sunday law" to be a constitutional exercise of the police power. That feeding sparrows, a work of mercy justified even by the Westminster Catechism, and rendering services of cleanliness, supposed to be nigh to godliness, can be made

criminal offences, shows that crime is not necessarily vicious or sinful, but, apart from the statute, may be harmless or commendable. On the other hand, in many jurisdictions acts prohibited by divine law are not criminal because not forbidden by human statute; for instance, idolatry and adultery.

Sin is violation of divine law jeoparding the soul. Vice is habitual doing of something that is of itself a defect in good morals, which are good customs tending to promote the general welfare. What is considered vicious in one community or epoch may be esteemed moral in another. What is harmless in moderation is vicious in excess.

These distinctions are not always regarded. Very recently, a religious journal, edited by a most able and scholarly teacher, differentiated vice from crime by defining the former as "a violation of the moral code, the direct injurious effect of which falls exclusively on the wrong-doer," and the latter as "a violation of the moral code, the direct injurious effects of which fall in considerable measure upon others." Of these definitions, the former omits the characteristic of all vice, habitualness, and fails to include a host of vices,—tale-bearing, for instance, and its kindred immorality, of which Jack Falstaff said, "Lord, Lord, how subject we old men are to this vice of lying!" The latter is equally faulty in omitting the characteristic element of all crime, punishability. Their framer naturally concluded that, "it is the business of the law to prevent crime, but in general to prevent vice only when it becomes criminal,—that is, when the direct injurious effect falls in appreciable measure upon others than the wrong-doer"; an impotent conclusion if vice is never criminal unless punishable by law; moreover, it would be difficult to mention a vice the evil effects of which do not fall more or less directly upon others than the wrong-doer. Following the same line of thought, another leading religious journal lately argued that "there should be not a strict but a judicious administration of the law against Sunday saloons"; the distinction in practice between strict and judicious enforcement, however, not being made clear. Such reasoning confuses sin, crime and vice as much as Touchstone's railing at Corin; "Why, if thou never wast at court, thou never saw'st good manners; if thou never saw'st good manners, then thy manners must be wicked; and wickedness is sin, and sin is damnation. Thou art in a parlous state, shepherd." One earnestly opposed to

what he deems immorality easily passes to regarding it as wickedness, sin and damnation, and to endeavoring, often with mistaken zeal, to stamp it out by extreme and even questionable methods; forgetful that vice is habit, and that even the praiseworthy man desirous of improving this world on the wise Emersonian plan, of reforming one person, finds it no easy task to mend his own accustomed ways.

The police power is the very vaguely defined control exercised by the state,—in our country within the limits of written constitutions,—for the preservation of public order, and the protection of the citizens' right to health, comfort, fair dealing, and freedom of worship. In its widest sense, this power extends to preventing or punishing the highest crime as well as the smallest misdemeanor. It punishes the murderer; it may, although, unfortunately, it rarely does, punish those guilty of defiling floors and afflicting with the reek of stale cigars the nostrils of fellow-passengers in public conveyances. In a restricted sense, this power is applied to preventing or punishing, by civil as well as by criminal penalties, minor or habitual offences against public health and order. The growing and alarming tendency with us is to exercise the police power almost entirely by creating new crimes. Well-meaning persons of abounding faith believe that by legislation they can end whatever they disapprove of. Legislators are obliging to constituents. And so it has come about that, if we substitute "crime" or "misdemeanor" for "felony," the words of Sir James Mackintosh are as true to-day as when, on March 2d, 1819, in moving for a Parliamentary committee to inquire into the state of the criminal law, he said:

"As I take it, the most important consequence of the Revolution of 1688 was the establishment in this country of a parliamentary government. This event, however, has been attended by one inconvenience—the unhappy facility afforded to legislation. Every Member of Parliament has had it in his power to indulge his whims and caprices on that subject; and if he could not do anything else he could create a capital felony."

Since these words were uttered, the criminal law has been vastly improved, in that courts have ceased to be shambles as they were at the beginning of the nineteenth century, when, in England, a host of acts were punishable by death, most of which now are either lawful or merely misdemeanors,—such as breaking a fish-

pond or cutting down a tree, for which a man was hung in 1814 at the Essex assizes, the theft of anything in value over a shilling and fraudulent bankruptcy. These savage laws made life and property no safer than they are to-day, and defeated their own purpose by breeding a professional class of alibi witnesses, begetting technicalities in construing indictments that still protect rogues, and producing jurors capable of rendering such verdicts as "Guilty of stealing a guinea worth sixpence." In short, their rigor was modified in their enforcement, and they gave rise, in the words of Sir William Grant, to "a general confederacy of prosecutors, witnesses, counsel, juries, judges, and advisers of the crown to prevent the execution of the criminal law." But if we have reduced the degree of punishment we have, probably, under the police power increased the number of crimes; and whereas laymen should be able, at least, to ascertain what is lawful and right, that they may walk straitly, neither legislator, judge nor lawyer can tell without minute research what acts are criminal. The Society for the Prevention of Crime on January 17th last addressed a letter to the present Mayor of New York, saying:

"We are emphatic in our insistence that you brace your administration into accord with your oath, that you summon the exceptional resources that are at your command to the work of frankly and resolutely suppressing open or clandestine violation of recognized statutes, and thus either dignify law by the success with which you enforce it, or, by the demonstrated impossibility of enforcing it, convict the legislature of its moral obligation to come to your relief."*

Just what "recognized statutes" are, was not made clear, nor why they alone should be enforced, nor yet what relief the legislature should afford. The Mayor replied temperately, saying, among other things:

"I asked the presiding Justice of the Court of Special Sessions† a few weeks ago to furnish me with a list of misdemeanors as defined by the Legislature. He replied that he was unable to do so, for it would take

* The Mayor, in an ante-election speech to the "German-Americans" at Cooper Union, on October 24th, 1901, had said: "Now it is not expected that, if we are elected, the laws will be administered in a narrow and provincial spirit." On the same night the present District Attorney was reported by the *New York Times* as saying that, if he were elected, and any one was caught violating the excise law, he would exercise the discretionary power vested in him by statute in the matter, and that the liquor dealer would stand on the same footing as any one else.

† This court has exclusive jurisdiction in the first instance of misdemeanors committed in New York city.

an able lawyer three months to compile it. Does anybody suppose that all of these penalties are enforced, or that the administration is derelict because it does not go out of its way to find out what laws thus go by default."

The penal laws are not all contained in the Code, but are found as well in separate statutes, such as the Game, Labor, Dairy, and other laws regulating customary pursuits of men—medicine, dentistry, pharmacy, pedicuring, public accounting, even horse-shoeing. Which of these laws are "recognized"? And what specifically is meant by their "enforcement"? Are we to understand that laws are not enforced because many who violate them escape punishment? What seems to be constantly forgotten is that the law is a schoolmaster,—a very poor one, it may be,—and that its value is largely prophylactic: while every violation of it may not be punished, its presence upon the statute books and its execution in the case of proved violations educate the public mind to obedience. The enforcement of every law calls for the exercise of discretion; and punishment untempered with mercy defeats its purpose. The statutes regulating medical and dental practice have not done away with quackery and ineptness either in or out of the ranks of the professions; but they have tended to exclude from those ranks numberless incompetents, and to elevate the standard of medical education to its present high plane. No self-respecting man, aspiring to professional or social standing, risks becoming a misdemeanant by practising medicine without legal qualification. Yet those laws never have been, and never can be, so rigorously administered but that zealous searchers may find violating them a host of quacks, against whom, perhaps, competent legal evidence cannot be procured by decent methods. And if the fact that such violations go on be proof that the statutes are either ineffective or unenforced, the case against both the laws and the persons who administer them is made out. But is not every law enforced, if, whenever evidence of its violation is put before the authorities, the offense is prosecuted?

Laws increasing the difficulty of earning livelihood, or gratifying natural or even artificial wants and desires, if rigorously enforced by methods opposed to the common sense of fairness or decency, beget antagonism to authority and sympathy for offenders, even on the part of those enforcing the law. Burns, himself a callector of excise, sang none the less joyously how:

"The Deil cam' fiddlin' through the town,
And danced awa wi' the Exciseman,
And ilka wife cries, 'Auld Mahoun,
I wish you luck o' your prize, man.'"

It is worth while, then, for every one to consider what is the true function of the police force, and whether it is desirable for them to adopt the extreme methods sometimes employed in enforcing police legislation; for methods of enforcement are not less, perhaps they are more, important than the substance of the law.

The first and primary duty of these men is to protect life and property, to preserve public decency and to execute criminal process. When in any city these functions are thoroughly performed, that city is well policed. Writing of the English officials, Sir James Fitz-James Stephens says:

"The police in their different grades are no doubt officers appointed by law for the purpose of arresting criminals; but they possess for this purpose no powers which are not also possessed by private persons. They are, indeed, protected in arresting innocent persons upon a reasonable suspicion that they have committed a felony, whether a felony has in fact been committed or not, whereas the protection of a private person in that case extends only to cases in which a felony has been committed; and they are, and private persons are not, under a legal duty to arrest when the occasion arises; but in other respects they stand upon precisely the same footing as private persons. They require a warrant and may arrest without a warrant in the same cases. When they have arrested they are under precisely the same obligations. A policeman has no other right as to asking questions or compelling the attendance of witnesses than a private person has; in a word, with some few exceptions, he may be described as a private person paid to perform, as a matter of duty, acts which, if so minded, he might have done voluntarily."

Substantially, this describes the function of our policemen, which the New York Code of Criminal Procedure seems to limit still further, by authorizing them to arrest without warrant, even in case of felony, only if the crime has actually been committed and the officer has reasonable cause for believing that the person arrested committed it. No one has power to arrest for vicious practices not forbidden by law or for misdemeanors, without a warrant, unless the offences be committed within his view. Magistrates may issue warrants only upon being satisfied, by sworn information of facts within the affiant's knowledge, that a misdemeanor has been actually committed, and that there is reasonable

ground to believe that the accused committed it. Such an affidavit is insufficient if its allegations rest upon information or belief only. The facts must be positively sworn to. If an officer is legally authorized to make an arrest, but not otherwise, he may break open an outer or inner door or window in the performance of his duty, if, after giving notice of his authority and purpose, he is refused admittance; but he has no more right to force himself into a private house without legal authority than has any other citizen, and if he attempts so to do he may be lawfully resisted. An arrest for felony may be made at any time; but an arrest on Sunday or at night must be specially authorized, in the case of a misdemeanor, by the magistrate's endorsement on the warrant. In great cities, these principles are too frequently disregarded. Even a criminal has a right to live until his life is forfeited by law. Even those who pursue vice as a means of livelihood may lawfully, while at large, eat, drink, sleep, and even amuse themselves; they must have resorts wherein to satisfy those natural wants. It is reasonable to suppose that such places will not be conducted with entire decorum; but, unless the disorder therein is such as to amount to public nuisance and violation of the law, the inmates are entitled to the same protection that is due to the best citizen. Their houses are their castles. Yet, where lawbreakers congregate, it is wise to foresee and provide against the outbreak of their criminal propensities, while still allowing them the measure of liberty to which they are entitled.

Before the election in New York city of the reform administration of Mayor Strong, sequent to the disclosures of the Lexow Investigating Committee, the municipal statute known as the Consolidation Act, now as the charter, prescribed in detail, as it still does, the duties of the police force, directing them, among other things, by its 282d section, at all times, day and night, to preserve the public peace, prevent crime, maintain order, and to "carefully observe and inspect all places of public amusement, all places of business having excise or other licenses to carry on any business," all gambling and disorderly places, "and to repress and restrain all unlawful or disorderly conduct or practices therein." Thus was created a duty of surveillance, but not necessarily of suppression. Not only were gaming and other evil resorts thus placed under police supervision, but also all places wherein licensed business was carried on—that is to say, offices of physicians, lawyers, and

dentists, shops of pharmacists, and a host of other reputable places. There have been and still are in the city of New York persons habitually violating the laws regulating the practice of medicine, dentistry, pharmacy, and other pursuits; but there is scarcely a known instance wherein the police, of their own motion, have either kept the business places of such persons under surveillance, or caused the arrest of those violating laws therein; nor do the persons and societies interested in securing and enforcing those laws hold the District Attorney and the police force negligent because they do not undertake systematically to collect the evidence necessary to carry out the law to the letter. The 285th section of the Consolidation Act empowered the Superintendent of Police, upon the written report of any member of the police force, or of two or more householders, stating good grounds for believing any house, room or premises to be used for common gaming or playing games of chance or lewd amusements, to authorize any member of the force to enter therein, arrest all persons found violating the law and seize all implements for gaming. So far-reaching was this power that, for some years prior to Mayor Strong's administration, a superintendent's warrant had rarely been issued, and yet the failure to apply therefor was one of the facts upon which charges were sustained against Police-Captain Eakins, who was dismissed from the force for neglect of duty in failing to exercise all reasonable methods of suppressing evil resorts in his precinct. Nevertheless, the framers of the present charter, while preserving that section as section 318 of the new statute, have omitted policemen from the number of those entitled to make such reports, leaving that privilege or duty to householders,—probably from a perception of what enormous opportunity for oppression was placed in the hands of the police by the earlier section.

Such powers being lodged in the police, the practical and most difficult question arises: What are they to do in order to enforce these manifold statutes? Where a crime is committed in their presence, thus affording them legal evidence of the offence, it is their duty, as we have seen, to make an arrest. But how far are they to go in gathering evidence of minor crimes that they may be, morally yet not legally, certain are taking place? The case of Captain Eakins already referred to is instructive. The metropolis from time to time is aroused to a sense of sin by rural investi-

gators or its own reformers, sits on the stool of repentance a while and then merrily goes back to its wallow. Such an awakening followed the Lexow investigation. Forty members of the police force were indicted,—most of them for the crime of extortion, always the besetting sin of society's paid protectors. Out of eight brought to trial, five were acquitted and three convicted. One conviction was sustained, the accused having recklessly pleaded guilty. Thirty-one complaints were made before the police commissioners, who dismissed fifteen men from the force, the majority of whom were subsequently restored to their positions by the courts. The dismissal of Captain Eakins was one of those sustained. He was not charged with extortion, but with neglect of duty in permitting certain evil resorts to exist. He frankly admitted that he knew of their existence, but, nevertheless, had reported to the superintendent of police that there were no disorderly places in his precinct. He sought to justify this misstatement of fact upon the ground that it did not deceive the superintendent, who had ordered his captains to suppress such places if they had sufficient evidence, but, otherwise, not to report them. It was amply shown by the testimony of reputable witnesses, including clergymen of different denominations, that the captain's precinct had greatly improved under his administration. It was also shown that he had arrested a great number of disorderly persons in the streets. The prosecution showed in disagreeable detail, by testimony of certain "agents" to their observation of and participation in debauchery, that the evil resorts specified were openly carried on and easily accessible. It may be said in passing that, although the attorney for the prosecution subsequently became head of the police commission, those places, if report may be believed, continued to exist and for the most part exist to this day.* One of the commissioners, Colonel (now General) Grant, differing with his colleagues, voted to acquit the accused officer, upon the ground that, if the uniformed police force were required in order to suppress such places to procure evidence by the methods of those "agents," the necessary result would be so to deprave the men that they would turn to blackmail as a cleaner employment. While the Supreme Court held that, from

* Stow's "A Survey of the City of London," 1597, says that in the thirty-seventh year of Henry VIII., 1546, the Stews of Southwark were put down by proclamation and sound of trumpet. "But though the sin was no longer allowed in this place, the same sin still remained."

the evidence, his colleagues "were permitted" to infer neglect of duty by the accused officer, they appear at the same time to have fully sustained Commissioner Grant's disapproval of the use by the uniformed force of "agents'" methods. They said: "If evidence as to the character of such houses could only have been obtained in the manner in which the witnesses for the prosecution obtained it, the findings would hardly be justified"* This dictum would imply a distinct advance from the position taken by that Court in the unreported cases of Police Officers Horan† and Blonk,‡ both of whom, after dismissal from the force for committing vicious acts in order to secure evidence against low resorts, it restored to office. Blonk's case is unreportable; Horan's in its way is amusing. His captain bade him get evidence against a low resort kept by the notorious "The" Allen, and gave him money for that purpose. He spent the money elsewhere, pawned his overcoat for two dollars, and was discovered in Allen's place drunk and disorderly on the proceeds—but, as the court held, drunk and disorderly in the line of duty.

Committing magistrates in excise cases require proof that the liquor alleged to have been sold in violation of the law was alcoholic. Its color, odor, sale over a bar and such circumstances are not accepted as sufficient evidence; the witness is required to have drunk or tasted the fluid. Should policemen be ordered to enter bar-rooms and tipple for the sake of enforcing the excise law? The sort of evidence required in other cases, the sort adduced against Captain Eakins, is such that no man procuring it can preserve self-respect and moral tone. Commissioner Grant having taken the position that men of the uniformed force should not be ordered to do such things, when he found the Mayor holding a different view, was consistent, and resigned his Commissionership.

There can be no doubt that extortion is practised by the police force of every great city.§ There is as little doubt that the men are often tempted to wink at violations of law, not only by the vicious, but by "respectable" citizens—merchants, for instance, who blockade sidewalks for purposes of their trade. On the other hand, it is certain that the police force contains a splendid body of

* People ex rel. Eakins vs. Roosevelt, 16 App. Div. at page 371.
† Memorandum, 35 Hun 671. ‡ Memorandum, 45 Hun 589.
§ In "Esther Waters," Mr. Moore puts the London "tariff" below New York's: "So you're a copper, are you? I might 'ave known it. . . . I know your sort; them that pays 'alf a crown a week to be let alone,—yer pension, it is out of their pockets."

men; there is not a day when its members do not risk their lives in the performance of duty; courageously arresting desperate malefactors, stopping maddened runaways, rescuing the drowning and carrying inmates from burning houses. If, as is unfortunately true, their testimony has come to be doubted, it is to some extent due to the fact that truth is not rigorously exacted of them. Honest men naturally revolt against espionage. "We are true men, thy servants are no spies," was the cry of Joseph's brethren. Where untruthfulness and base acts are made part of official duty, the wonder is not that there is so much but that there is so little deterioration of moral fibre.

Certain laws are to an extent self-enforcing—the laws prohibiting acts which are sometimes called *mala per se,* as being wrong in themselves, and so regarded by the universal sense of right and good morals, such as murder and offences against property. Individuals affected by these wrongs set the law in operation and come forward as witnesses. This is not so with the *mala prohibita,* or acts which the ordinary man is willing on the whole to have prohibited, but has no lively interest in punishing. Statutes prohibiting acts of this class are usually secured by persons to whom they seem highly important. Without the efforts of the medical profession, for instance, it may be doubted whether laws regulating the practice of medicine would be enacted, and experience certainly shows that, if "enforcement" means procuring evidence against offenders, they would not be enforced except in comparatively rare instances. Moreover, if such enforcement of all these statutes were undertaken by the police, they would have no time for their primary duties, and the field for blackmail would be indefinitely extended. Laws of this kind are, for the most part, set in motion by societies incorporated with power to aid in prosecution. They secure the necessary evidence. Their officers are responsible men who proceed with caution, realizing their liability in actions for false arrest and malicious prosecution to persons whose liberty they may unlawfully restrain. Thus these laws are adequately enforced, the liberty of the citizen better safeguarded, and the law's administration taken out of politics. If the methods of these societies become obnoxious and intolerable, the remedy is at hand. They have the right, but not the duty, to prosecute, and are free to exercise discretion and discharge their function in no "narrow and provincial spirit." All such laws

are liable to abuse. They afford opportunity for oppression. But an oppressive society is less harmful and more easily gotten rid of than an oppressive police force. Sydney Smith, in 1804, writing in the *Edinburgh Review,* deplored the existence of a society formed for the suppression of "vice," in which term was then included remissness in religious observance, saying:

"Men whose trade is rat catching love to catch rats; the bug destroyer seizes on his bug with delight, and the suppressor is gratified by finding his vice. The last soon becomes a mere tradesman like the others; none of them moralize or lament that their respective evils should exist in the world. The public feeling is swallowed up in the pursuit of a daily occupation and in the display of a technical skill."

There is truth in this; yet, undoubtedly, such societies in our modern life work for good, even if incidentally they do some harm. But nothing can be truer than these other words of the dean:

"You may drag men into church by means of force, and prosecute them for buying a pot of beer, and cut them off from the enjoyment of a leg of mutton; and you may do all this till you make the common people hate Sunday, and the clergy and religion and everything which relates to such subjects. . . . You may produce outward conformity by these means; but you are so far from producing (the only thing worth producing) the inward feeling, that you incur a great risk of giving birth to a totally opposite sentiment."

The present public prosecutor of New York, who was a coadjutor of the President of Mayor Strong's Police Board in essaying a strenuous enforcement of excise laws by police espionage, has frankly said that the result of their joint efforts was nothing more than "to raise the amount of blackmail from the five dollars a month levied on the saloon-keeper during former administrations, to ten dollars during ours."

A solution of the vexed problem of enforcing police legislation is not offered here; but it is suggested that the abuses now existing in the police force would be much lessened if the men were restricted to their true function, the protection of life, property, and public decency, the execution of process, and the surveillance of places suspected of being evil resorts, so as promptly to suppress there as elsewhere, but not otherwise, offences against public order. They should not be required to become petty spies and *agents provocateurs;* nor should they be called upon in the ordinary discharge of duty to be liars and enticers. If evidence must be procured by

tippling and consorting with the lewd, it should be procured by a small body of jackals amenable to special discipline, or by "agents" of suppressing societies; not by the uniformed force. If necessary, let the law of evidence be modified and adapted to the exigencies of the case, as it has been in prosecutions under the game laws and similar statutes, although this is an experiment fraught with danger. But instead of ordering policemen to participate in vice in order to punish it, their superiors should call to sharp account members of the force found in liquor saloons or other evil resorts except when making arrests or executing process. Thus the self-respect and character of the police force would be advanced, and the liberty of the citizen safeguarded, even perhaps the liberty to do some things not seriously affecting the public welfare, and if considered vicious by some, not so considered by all.

Policemen are better paid and pensioned than soldiers. Their duties require as much courage and more discretion. Their uniform should cover as much honor. Soldiers are ordered to scout for information, but not to spy; and short shrift awaits a spy when captured. Would not the establishment of a like standard in the police force greatly minimize the vice of extortion?

W. A. PURRINGTON.